No. 85-495

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF THE PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The Equal Employment Advisory Council (EEAC) and the National School Boards Association (NSBA), with the written consent of all parties, respectfully submit this brief as amici curiae in support of the petitioners.[1]

INTEREST OF THE AMICUS CURIAE EQUAL EMPLOYMENT ADVISORY COUNCIL

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies,

[1] The consents of all parties have been filed with the Clerk of the Court.

procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

EEAC members are either employers or associations of employers that are subject to the requirements of Title VII of the Civil Rights Act of 1964 and related regulations. Accordingly, EEAC has a vital interest in the issue here before this Court, namely, whether Title VII requires an employer that already has made reasonable accommodation of the religious beliefs and practices of its employees, to make further accommodations proposed by an employee if the employee's proposed accommodations would not cause "undue hardship" to the employer's business.

Because of its interest in the religious accommodation requirements of Title VII, EEAC has filed numerous briefs amicus curiae in this Court and in the United States Courts of Appeals in cases interpreting those provisions. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Thornton v. Caldor, Inc.*, 105 S.Ct. 2914 (1985); *Gavin v. Peoples Natural Gas Co.*, 613 F.2d 482 (3rd Cir. 1980); *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 643 F.2d 445 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046

(1981); and *Anderson v. General Dynamics Convair Aerospace Div.*, 648 F.2d 1247 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982).[2]

INTEREST OF THE AMICUS CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION

Amicus Curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of the country's public school children.

The individuals who compose the school boards of this country are elected or appointed community representatives. They are responsible under state law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions.

The funding for salaries and other expenses of the school district comes directly from public moneys, including state and federal funds and local property taxes. School boards have a duty to the taxpayers to assure that all activities are conducted in the most administratively sound and cost effective manner. That is not to say that the civil rights of both em-

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[2] Because of its concerns with the legal and practical problems inherent in EEOC's approach to religious accommodation, EEAC filed extensive comments with EEOC regarding that agency's "Proposed Guidelines on Discrimination Because of Religion." *See* 29 C.F.R. § 1605 (1980).

ployees and students are not of serious concern to boards. However, a balance must be struck between the rights of employees and the needs of the district in serving its students. School district operations are extremely labor intensive, and there are few teachers or other employees whose duties can remain unattended during operating hours. It should be the sole province of the school district to select the reasonable accommodation of its employees' religious beliefs and practices, which causes the least disruption of the educational process. To require otherwise would seriously erode the management prerogatives of school boards.

Congress did not intend by its "reasonable accommodation" language to allow employees to dictate to their employer the means of the accommodation. Unlike private employers, school districts are bound by both religion clauses of the first amendment: first, to accommodate the "free exercise" interests of their employees and second, to assure that accommodation does not go so far as to result in establishment of religion. If the decision below is affirmed, school districts will find it even more difficult to walk that precarious line between the two religion clauses.

STATEMENT OF THE CASE

Respondent Ronald Philbrook has been employed by Petitioner Ansonia Board of Education ("the Board") as a teacher at Ansonia High School since 1962. Since 1968, Philbrook has been a member of the Worldwide Church of God, which requires its members to abstain from secular employment on certain holy days. Because several of those holy days usually fall on school days, Philbrook is required to miss about six school days per year.

Since the late 1960's, collective bargaining agreements between the Board and the Ansonia Federation of Teachers, the union that represents Philbrook and other Ansonia teachers, have provided for three days of paid annual leave for observance of religious holidays. The contracts provide additional days (currently 18) of paid leave for illness and other purposes, including three days for "necessary personal business." The contract, however, prohibits use of these personal business leave days for various specified purposes, including religious observances and any other purpose for which paid leave is otherwise provided. (Pet. App. 5a, n.2).

In order to accommodate Philbrook's need for additional days off to observe his church's holy days, the Board has consistently allowed him to take unpaid leave over and above the three days of paid leave provided under the contract. Philbrook, however, has requested additional accommodations. First, he has asked to be allowed to use paid personal business leave for religious observances. In the alternative, he has offered to pay the cost of hiring a substitute instead of being required to take unpaid leave.[3] In addition, he has offered to supervise the substitutes and to work at other times to make up for his unauthorized absences. The Board, however, has rejected both proposals.

Philbrook filed suit in the United States District Court for the District of Connecticut, alleging that the Board's policy of not allowing personal business leave to be used for religious observances constituted religious discrimination in violation of Title VII, and

[3] In 1984, a substitute cost $30 per day, while Philbrook's salary would have been docked over $130 for each day of unpaid leave.

also violated the free exercise clause of the First Amendment. After a trial, the district court found for the Board. *Philbrook v. Ansonia Board of Education*, 39 FEP Cases 1333 (D.Ct. 1984).

On appeal, a divided panel of the United States Court of Appeals for the Second Circuit reversed. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985). The panel majority held that Philbrook had established a prima facie case of religious discrimination under Title VII, by showing that he had informed the Board of his need for additional leave on holy days, and that he suffered a detriment (loss of pay) because of the conflict between his religious practices and the Board's employment requirements. *Id.* at 482. The panel also found that the Board had not successfully rebutted the prima facie case. Although it found the Board's policy of providing three days of paid leave, and additional days of unpaid leave, for religious services to be reasonable, the panel ruled that the Board still had to demonstrate that it could not comply with Philbrook's proposed accommodations without undue hardship. *Id.* at 484-485. The panel held that "Where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the *employee prefers* unless that accommodation causes undue hardship on the employer's conduct of his business." *Id.* at 484 (emphasis added). The court of appeals remanded the case to the district court for a determination of whether either of Philbrook's proposed accommodations would cause undue hardship to the Board. *Id.* at 485.[4]

[4] The Court of Appeals did not rule on the First Amendment issue, and that issue has not been presented on this appeal.

Judge Pollack filed a vigorous dissent in which he noted that the Board's policy neither made distinctions among employees nor denied Philbrook the opportunity to work or to observe his church's holy days. 757 F.2d at 488. Judge Pollack also observed that the Board had made reasonable accommodation of Philbrook's religious practices, and drew attention to *Pinsker v. Joint District Number 28J of Adams and Arapahoe Counties*, 735 F.2d 388 (10th Cir. 1984), in which the Tenth Circuit rejected the suggestion that Title VII requires an employer that has made reasonable accommodations to adopt a leave policy that is less burdensome to an employee's religious practices. 757 F.2d at 489.

SUMMARY OF ARGUMENT

The panel majority below erred in holding that Philbrook had established a prima facie case of religious discrimination against the Board. To establish a prima facie case, a plaintiff must show that his religious beliefs or practices conflicted with the employer's work requirements, and that he was disciplined, discharged, or otherwise denied some benefit or privilege of employment for failing to comply with the conflicting work requirement. Philbrook's religious practices, however, did not conflict with the Board's employment requirements. To the contrary, the Board not only allowed him to take as much leave as he needed for religious observances, but also, under the terms of its collective bargaining contract, afforded him the first three days of such leave each year *with pay*—a benefit not enjoyed by other employees who did not take religious leave.

Moreover, Philbrook was not discharged, disciplined or denied any benefit or privilege that he would have

received but for his religious beliefs. The Board allowed him to take leave without pay over and above the three days per year of paid leave for religious observances to which all employees were entitled under the collective bargaining agreement. When he took such unpaid leave, he was not being "disciplined," but merely was not receiving pay for days on which he did not work. He remained eligible for all the same contractually-specified amounts of paid leave for personal business, illness, and other purposes as all other employees.

Even if Philbrook is viewed as having established a prima facie case, however, the panel still erred in holding that the Board was required by Title VII to accept Philbrook's proposed accommodations if they did not cause the Board undue hardship, since the court had found the Board's leave policy to be a reasonable accommodation of Philbrook's religious beliefs. *American Postal Workers Union, San Francisco Local v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986). Title VII requires employers to make reasonable accommodations of employees' beliefs *or* to demonstrate inability to make such accommodations without undue hardship. Where, as here, an employer is found to have reasonably accommodated an employee's religious practices, the Title VII inquiry ends, because the employer has fulfilled its duty to accommodate. Where an employer has implemented nondiscriminatory employment practices that advance its legitimate business goals, Title VII has not been violated, and courts may not step in and restructure the employer's practices. *Cf. Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). Reversal of the decision below will encourage employers to adopt voluntary measures to accommodate employees' religious beliefs and thereby will promote the goal of achieving voluntary compliance with the requirements of Title VII.

ARGUMENT

I. A PLAINTIFF MAY NOT ESTABLISH A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION UNDER TITLE VII WHERE THE EMPLOYER HAS MADE REASONABLE ACCOMMODATION OF THE EMPLOYEE'S RELIGIOUS BELIEFS OR PRACTICES, AND HAS ALLOWED THE PLAINTIFF TO TAKE UNPAID LEAVES OF ABSENCE FROM WORK FOR RELIGIOUS OBSERVANCES.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, prohibits employers from discriminating against employees on the basis of religion, 42 U.S.C. § 2000e-2(a), unless an employer demonstrates that it cannot "reasonably accommodate" an employee's religious observances or practices without "undue hardship" to the employer's business. 42 U.S.C. § 2000e(j).[5] Although neither Title VII nor its leg-

[5] Section 703(a) of the Civil Rights Act provides that:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion. . . .

42 U.S.C. § 2000(e)-2(a). Section 701(j) of the Act qualifies § 703(a)'s proscription of religious discrimination as follows:

islative history indicates the degree to which an employer must accommodate the religious practices of employees, *see Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74-75 (1977), this Court has held that the duty to accommodate does not require employers to take steps inconsistent with otherwise valid collective bargaining agreements. *Id.* at 79. The Court in *Hardison* also held that Title VII does not require employers to discriminate against some employees in order to accommodate the religious beliefs or practices of other employees. *Id.* at 81. Finally, the Court in *Hardison* ruled that an accommodation imposing more than a *de minimis* cost on the employer constitutes an "undue hardship." *Id.* at 84 (footnote omitted).

The panel below set forth a proper statement of the plaintiff's prima facie burden of proof in a discrimination case under Title VII:

> A plaintiff in a [Title VII] case makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.

757 F.2d at 481. *See also Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Anderson v. General Dynamics Convair*

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

Aerospace Div., 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978); *Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979). The panel majority erred, however, in concluding that Philbrook had "almost certainly" satisfied this prima facie standard. 757 F.2d at 481.

Assuming, as amici do, that Philbrook's religious beliefs are genuine, the panel majority erred in two respects in finding that he had established a prima facie case of religious discrimination under the test set forth above. First, the Board's employment requirements simply did not conflict with Philbrook's religious beliefs and practices. Far from it: whenever Philbrook has needed to be absent from work for religious observances, he has always been allowed to do so. Indeed, under the collective bargaining agreement, Philbrook has taken the first three days of such absences each year *with pay* and enjoyed three more paid days off than nonreligionist employees. Although he was required to take unpaid leave for additional days of religious observances, the fact remains that the Board's requirements did not conflict with Philbrook's need to be absent on those days.

Second, Philbrook was not "disciplined for failure to comply with the conflicting employment requirement." 757 F.2d at 481. "Discipline," in the employment context, suggests some form of punishment for failing to observe an employer's rules or policies. The term scarcely can be stretched so far as to cover the Board's declining to pay Philbrook for *all* of his absences on holy days.[6] Perhaps for that reason, the

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[6] An employer, after all, is under no obligation to pay employees for work they do not perform for religious reasons. *EEOC v. Caribe Hilton International*, 597 F. Supp. 1007, 1012 (D.P.R. 1984).

majority later characterized Philbrook as having "suffered a detriment"—not as having been disciplined—because his religious beliefs conflicted with the Board's employment requirements. 757 F.2d at 482. Upon examination, however, the "detriment" the majority perceived becomes illusory. Philbrook received pay for every day he worked and for as many days on which he missed work for religious reasons as any other employee was entitled to receive. He likewise remained eligible to take as many days off with pay for non-religious personal business, illness, and other contractually-sanctioned purposes as any other employee. Thus, in no meaningful sense was he placed at a detriment relative to other employees because of his religion.

Indeed, the panel's holding strays even farther from its supporting case law than the above analysis indicates. *Turpen*, *Brown*, *Anderson* and *Redmond*, on which the panel based its analysis of the prima facie case, all involved employees that were *discharged* because of the alleged incompatibility of their religious beliefs and their employers' work requirements. It surely is a far cry from those discharge cases to the situation before this Court, in which Philbrook not only has not been fired, but has been given as much leave as he needed for religious observances, and actually has been *paid* for the first three days of such leave every year.

In a recent decision involving strikingly similar facts, the Tenth Circuit Court of Appeals held that a school district had not violated Title VII, even though its religious leave policy was less favorable to employees than that of the Board. *Pinsker v. Joint District Number 28J of Adams and Arapahoe Counties*, 735 F.2d 388 (10th Cir. 1984). In *Pinsker*, a Jewish

school teacher claimed that the school district had violated Title VII by providing a maximum of two days paid annual leave for observance of Jewish holidays. In some years three Jewish holidays fell on school days, and the plaintiff had to use one day of unpaid leave in those years for religious observances.

The Tenth Circuit rejected the plaintiff's contention that the school district was required by Title VII to institute a leave policy that would be less burdensome to his religious practices. The court held that the plaintiff had not made out a prima facie case of discrimination:

> Defendant's policy and practices jeopardized neither Pinsker's job nor his observation of religious holidays. Because teachers are likely to have not only different religions but also different degrees of devotion to their religions, *a school district cannot be expected to negotiate leave policies broad enough to suit every employee's religious needs perfectly.* Defendant's policy, although it may require teachers to take occasional unpaid leave, is not an unreasonable accommodation of teachers' religious practices. Thus, the trial court correctly determined that *plaintiff did not make a prima facie showing of discrimination.*

735 F.2d at 391 (emphasis added).

Amici submit that the Tenth Circuit's reasoning in *Pinsker* should be followed by this Court. Like the plaintiff in *Pinsker*, Philbrook has not been forced to choose between his job and the observance of his church's holy days. The leave policy in question here has removed any potential conflict between the Board's employment requirements and Philbrook's religious needs. Moreover, Philbrook has not been deprived of

any benefit or privilege of employment by the Board because of his religious practices. He simply has not been paid for *some* (but not *all*) of the holy days on which he did not work. *See EEOC v. Caribe Hilton*, *supra* n.6. Accordingly, the panel should not have found that Philbrook had established a prima facie case of religious discrimination.

II. WHERE AN EMPLOYER HAS MADE REASONABLE ACCOMMODATIONS TO THE RELIGIOUS BELIEFS AND PRACTICES OF EMPLOYEES, TITLE VII DOES NOT REQUIRE THE EMPLOYER TO MAKE ANY AND ALL ADDITIONAL ACCOMMODATIONS PROPOSED BY AN EMPLOYEE, EVEN IF SUCH ACCOMMODATIONS WOULD NOT CAUSE UNDUE HARDSHIP TO THE EMPLOYER.

A. Courts Can Determine Whether an Employer Has "Reasonably Accommodated" an Employee's Religious Practices Without Reference to the "Undue Hardship" Standard.

Even if the panel were correct in holding that Philbrook had established a prima facie case, it still erred in ruling that the Board violated Title VII by refusing to accommodate Philbrook's religious needs in precisely the manner he requested. As noted, the panel majority agreed with the Board that the Board's policy of affording three days of paid leave and additional days of unpaid leave for religious observances was a reasonable accommodation of Philbrook's religious beliefs and practices. 757 F.2d at 484. The panel went on to declare, however, that the Board's duty to accommodate "cannot be defined without reference to undue hardship," *id.*, and that

> Where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the *employee* prefers unless that accommodation causes undue hardship on the employer's conduct of his business.

Id. (emphasis added). This broad proposition is unsupported by case law—indeed, is contrary to case law—and if affirmed would expand impermissibly the scope of employers' duty to accommodate their employees' religious beliefs and practices under Title VII.

To begin with, the court's assertion that "the duty to accommodate . . . cannot be defined without reference to undue hardship" is simply wrong. Sections 703(a) and 701(j), read together, provide that an employer may not discriminate against any individual because of his religion, "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §§ 2000e-2(a), 2000e(j). The clear import of this proviso is that an employer that *does* "reasonably accommodate" such practices does not violate Title VII. In such circumstances, the issue of "undue hardship" simply does not arise, because the employee's religious practices have been accommodated. Only if the employer does not reasonably accommodate the employee would the issue of "undue hardship" even be addressed.

The Tenth Circuit has recognized the common sense proposition that "[s]imply put, Title VII requires reasonable accommodation *or* a showing that reasonable accommodation would be an undue hardship on the employer." *Pinsker*, *supra*, 735 F.2d at 390 (citation omitted; emphasis added). Similarly, the Sixth Circuit has held that "§ 701(j) requires that a rea-

sonable accommodation be made *or* a showing that to do so would work an undue hardship." *McDaniel v. Essex International, Inc.*, 571 F.2d 338, 341 (6th Cir. 1978) (emphasis added). Likewise, the Ninth Circuit has stated that it is the employer's burden to show that it made good faith efforts to accommodate the employee's religious beliefs and, *if those efforts were unsuccessful*, to demonstrate inability to reasonably accommodate those beliefs without undue hardship. *Anderson, supra*, 589 F.2d at 401 (citation omitted).[7]

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[7] The panel majority relied on regulations issued by the Equal Employment Opportunity Commission (EEOC) in support of its suggested approach. 757 F.2d at 485. Those regulations, found at 29 C.F.R. § 1605.2(c) (2) provide that:

> When there is more than one method of accommodation available which *would not cause undue hardship*, the Commission will determine whether the accommodation offered is *reasonable* by examining:
>
> (i) The alternatives for accommodation considered by the employer or labor organization; and
>
> (ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunites [sic], such as compensation, terms, conditions, or privileges of employment. *Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.* (Emphasis added.)

The EEOC regulations, however, suffer from the same infirmity as the panel majority's reasoning—they put the cart before the horse. As noted, Title VII requires reasonable

B. Other Circuits Have Rejected the Panel's Proposed Approach, Under Which an Employer Always Would Have to Accept an Employee's Preferred Means of Accommodation Unless It Would Cause Undue Hardship to the Employer.

The panel's proposed approach was explicitly rejected in a recent decision of the Ninth Circuit Court of Appeals. *American Postal Workers Union, San Francisco Local v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986). In that case, the plaintiffs were Postal Service window clerks whose religious beliefs precluded them from processing draft registration materials. A Postal Service regulation, however, required window clerks to process such materials or, in the event of a religious conflict, to transfer to a position that did not require such processing. The right to transfer was contained in a collective bargaining agreement, and the Postal Service declined to make any other accommodations. *Id.* at 774.

The plaintiffs sued the Postmaster General, claiming that the Postal Service violated Title VII by refusing to allow them to remain in their positions as window clerks and to refer draft registrants to other such clerks, rather than having to handle draft registration materials or transfer to other positions. The district court found for the plaintiffs. Assuming that the opportunity to transfer constituted "reasonable accommodation," the court ruled that because the plaintiffs considered that accommodation "wholly inadequate," the Postal Service was required to implement the plaintiffs' proposal unless it would constitute

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accommodation *or* a demonstration that reasonable accommodation cannot be made without undue hardship. If, as in this case, reasonable accommodation *has been made*, the issue of undue hardship never arises.

undue hardship. *American Postal Workers Union v. Postmaster General*, 35 FEP Cases 1484, 1488 (N.D. Calif. 1984). Because it found that the plaintiffs' proposed accommodation would not cause undue hardship, the district court held that the Postal Service had violated Title VII. *Id.* at 1488.

The Ninth Circuit (per curiam) reversed, explaining that the district court had failed to distinguish between situations in which the employer's accommodation effectively eliminates an employee's religious conflict, and those in which the employer's accommodation fails to eliminate that conflict. 781 F.2d at 776. The court of appeals found that the Postal Service's proposed accommodation effectively eliminated the plaintiffs' religious conflicts, and that the plaintiffs rejected that accommodation "not because the transfer failed to eliminate their religious conflict, but because they believed the accommodation would place them in a less attractive employment status." *Id.* The court held that:

> The position advanced by [plaintiffs] stands for the proposition that an employer must accept any accommodation, short of "undue hardship," proposed by an employee, regardless of whether the employee rejects an accommodation proposed by the employer solely on secular grounds. *Title VII does not compel that conclusion.*

Id. (emphasis added). The court went on to hold that an employer need implement the employee's accommodation (assuming that it does not involve undue hardship) *only* if the *employer's* proposed accommodation *fails to eliminate the employee's religious conflict:*

> Where an employer proposes an accommodation which effectively eliminates the religious conflict faced by a particular employee, however, the inquiry under Title VII reduces to whether the accommodation reasonably preserves the affected employee's employment status.

Id. at 776-777. The court of appeals ruled that the district court had erred in requiring the employer to accept the employees' proposed accommodation unless that accommodation would cause undue hardship, and remanded the case to the district court for a determination whether the Postal Service's proposed accommodation would reasonably preserve the plaintiffs' employment status. *Id.* at 777.

The Ninth Circuit's analysis in *Postal Workers* demonstrates clearly that the Board has discharged its duty of reasonable accommodation in this case. Its leave policy has, beyond question, eliminated Philbrook's perceived religious conflict. Moreover, Philbrook's employment status not only has been "reasonably preserved," but has not been affected at all. Accordingly, the Board has satisfied its obligation under Title VII, and it was improper for the panel to address the issue of whether Philbrook's proposals would involve undue hardship.

At least two other courts of appeals have implicitly rejected the approach taken by the panel majority in this case. In *Pinsker*, *supra*, the Tenth Circuit ruled that the school district had reasonably accommodated the plaintiff's religious practices by affording two days of *paid* leave, and an additional day of unpaid leave, for religious observances. The court of appeals rejected the plaintiff's contention that the district should institute a more favorable leave policy (for example, by allowing all teachers additional days for religious leave or by permitting teachers to make up

religious leave by doing other work). 735 F.2d at 390. The court observed that:

> Title VII requires reasonable accommodation. *It does not require employers to accommodate the religious practices of an employee in exactly the way the employee would like to be accommodated. Nor does Title VII require employers to accommodate an employee's religious practices in a way that spares the employee any cost whatsoever.*

Id. at 390-391 (citations omitted; emphasis added). Having found that the school district had reasonably accommodated the plaintiff, the court did not require the school district to show that the employee's proposed additional accommodations would pose an undue hardship.

Likewise, in *Mann v. Milgram Food Stores, Inc.*, 730 F.2d 1186 (8th Cir. 1984), the Eighth Circuit affirmed a district court decision that an employer that had made reasonable efforts to accommodate an employee's religious beliefs before discharging him had not violated Title VII. The court of appeals held that "Neither the fact that Mann made alternative accommodation suggestions nor that Milgram's did not accept those suggestions establishes that the district court's findings in this regard are clearly erroneous." *Id.* at 1189 (footnote omitted). Again, the court did not require the employer, which had reasonably accommodated the employee, to demonstrate that the employee's proffered accommodations would have meant undue hardship to the employer's operations.

To similar effect is the district court decision in *Stern v. Teamsters "General" Local Union No. 200*,

39 FEP Cases 1526 (E.D. Wis. 1986), *appeal docketed*, No. 86-1224 (7th Cir., February 13, 1986). In that case, the court held that an employer and union had reasonably accommodated an employee whose religious beliefs prevented him from joining or financially supporting the union, by allowing him to pay the equivalent of union dues to a nonreligious charity. *Id.* at 1529. The court found no violation of Title VII even though the employee had sought instead to be allowed to pay the equivalent of union dues to a religious broadcaster. *Id.* The court granted summary judgment to the employer and union because they had offered the employee a reasonable accommodation that he refused to accept. *Id.*[8]

In addition, several courts of appeals have ruled that an employee seeking accommodation of his religious practices must try to reconcile the requirements of his faith with the employment requirements of his employer *through means provided by the employer*. As the Fifth Circuit has explained:

> Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the

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[8] In *Stern*, the accommodation offered by the employer and union was of the kind explicitly sanctioned in a 1980 amendment to the National Labor Relations Act. *See* 29 U.S.C. § 169. The logic of the *Stern* decision, however, is not limited to instances in which Congress has specifically approved of certain kinds of accommodation. Rather, it is that where (because of Congressional approval *or other reasons*) an employer's proposed accommodation is found to be *reasonable*, Title VII does not require the employer to accept an employee's alternative proposal, even if the latter would not involve undue hardship.

> employer. A reasonable accommodation need not be on the employee's terms only.

Brener v. Diagnostic Center Hospital, 671 F.2d 141, 146 (5th Cir. 1982) (footnote omitted). *See also Postal Workers*, *supra*, 781 F.2d at 777; *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285-86 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978); *cf. Redmond v. GAF Corp.*, *supra*, 574 F.2d at 901-902.

Those decisions clearly reject the panel's approach, under which an employee would have no duty to attempt to satisfy his needs by means of the employer's procedures, no matter how reasonable those procedures might be. As the Ninth Circuit has explicitly recognized, the approach suggested by the panel majority in this case

> would have the effect of shifting the entire responsibility for accommodation to the employer, by granting an employee the unequivocal right to have every alternative assessed under the "undue hardship" standard. Such a result runs contrary to the basic premise of § 701(j), *i.e.*, mutual cooperation.

Postal Workers, *supra*, 781 F.2d at 777.[9]

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[9] *Brener v. Diagnostic Center Hospital* and *Turpen v. Missouri-Kansas-Texas Railroad Co.*, relied on by the majority, offer little support for its approach. As noted *supra*, the Fifth Circuit's emphasis in *Brener* on the employee's duty to seek accommodation through means offered by the employer, *see* 671 F.2d at 145-146, is incompatible with the panel's approach.

The panel also cited a reference in *Turpen* to the "interlocking" nature of the "reasonable accommodation" and "undue hardship" provisions of § 701(j). 757 F.2d at 484. The Fifth Circuit's reference was made, however, only in passing, and then in an entirely different context from the one presented in this case. *See* 736 F.2d at 1026.

C. The Decision Below Is Inconsistent with This Court's *Furnco* Decision and Reversal Would Preserve Traditional Management Prerogatives While Promoting Voluntary Efforts to Accommodate Employees' Religious Beliefs.

The panel majority's proposed approach also is incompatible with reasoning previously employed by this Court. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), a case involving the validity of an employer's hiring procedures under Title VII, the Court ruled that the employer was required to show only that employment decisions were based on legitimate considerations (and not on race), and were made to enable the employer to achieve business goals. *Id.* at 577. The Court rejected the suggestion that Title VII required the employer to adopt hiring procedures that would maximize the hiring of minorities. *Id.* at 577-578. In ruling that Title VII does not allow courts to second-guess employers' legitimate, nondiscriminatory business decisions, the Court noted that "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Id.* at 578.

The Court's reasoning in *Furnco* applies with equal force in this case. Where an employer such as the Board has reasonably accommodated the religious needs of employees, it is not required to make additional accommodations proposed by employees, even if such accommodations would not involve undue hardship. The plain meaning of *Furnco* is that it is the purpose of Title VII to prevent employment discrimination, not to allow courts and agencies to tinker at will with employers' legitimate, nondiscriminatory practices.

The majority's approach, moreover, would undercut the clearly expressed intention of Congress in enacting Title VII that management prerogatives not be unnecessarily interfered with. This Court in *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 (1979), noted that:

> Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." (Citation omitted.)

In *Weber*, *id.* at 207, the Court further cautioned that Congress did not intend Title VII to "diminish traditional management prerogatives" or "to limit traditional business freedom." *See also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Under the panel's approach, however, management's traditional prerogative to set and enforce leave policies would be replaced to a significant extent by a system of ad hoc leave policies dictated largely by employees.

Finally, the panel's approach, if adopted, could discourage employers and school boards from voluntarily adopting policies designed to accommodate employees' religious practices. Currently, many employers unilaterally, or in collective bargaining agreements with unions, establish policies and procedures under which employees' religious needs may be accommodated. Such procedures, in addition to formal provisions of leave for religious observances, include arrangements for voluntary swaps of shifts or overtime work among employees, flexible scheduling, and transfers and reassignments to jobs that do not require work on employees' holy days. Most collective bargaining agreements contain seniority provisions, which this Court has held can represent "significant accommodation" to both the religious and secular needs of employees. *Hardison*, *supra*, 432 U.S. at 78. *See also United States v. City of Albuquerque*, 545 F.2d 110, 113-114 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) (reasonable accommodations embodied in fire department's rules and regulations).

Should the panel majority's approach be adopted, however, the incentive for employers and unions voluntarily to anticipate the religious needs of employees and to fashion policies to accommodate those needs would be greatly diminished. Having been put in the onerous position of having, in effect, to negotiate a separate accommodation for every employee whose religion may require accommodation, many employers may decide not even to attempt to adopt an accommodation policy generally applicable to all employees, but rather may deal with the issue on an ad hoc basis. One unfortunate consequence could be that employees who were unaware of their rights under Title VII, and hence did not seek accommodation of their beliefs, might receive no accommodation at all.

If the panel's approach is rejected, on the other hand, employers still will have a significant incentive to attempt voluntarily to accommodate employees' religious practices. Employers will be encouraged to formulate policies likely to be upheld as "reasonable" accommodations, because implementing such accommodations will satisfy the duty to accommodate under Title VII. Such a result is entirely consistent with the frequently recognized goal of pro-

moting voluntary compliance with the requirements of Title VII. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *W.R. Grace & Co. v. Local 759*, 461 U.S. 757, 770-771 (1983).

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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March 31, 1986